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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARILYN SILVA et al., Plaintiffs and Respondents, v. MARGARET CANNIZZARO, Objector and Appellant.	H034301 (Santa Clara County Super. Ct. No. PR162366)

Respondents Marilyn Silva, Paul Silva, and James Silva filed a petition under former section 21320 of the Probate Code,[1] seeking a declaration that their proposed first amended petition for instructions and interpretation of the Silva Family 1991 Living Trust (the Trust) would not be a contest within the meaning of the Trust's no-contest clause. The superior court granted the petition, concluding that the proposed litigation would not be a contest. Appellant Margaret Cannizzaro appeals from that order. We conclude, as the trial court did, that the proposed litigation is not a contest because it does not seek to nullify, invalidate, or otherwise alter the terms of the Trust. Accordingly, we shall affirm.

[1] All further statutory references are to the Probate Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondents and appellant are the four adult children of Manio and Helen Silva, the settlors and original trustees of the Trust. When Manio[2] died in 2001, Helen continued as the sole trustee and the Trust was divided, according to its terms, into three subtrusts: the Surviving Spouse's Trust, the Marital Qualified Terminable Interest Property Trust (QTIP Trust) and the Family Bypass Trust. The Surviving Spouse's Trust is revocable. The QTIP and Family Bypass trusts are irrevocable. In 2006, appellant was appointed conservator of Helen's person and estate. Appellant is now the trustee, as well.

This dispute concerns Helen's withdrawal of all the assets out of the QTIP Trust. According to respondents, sometime after Manio died, while Helen was the sole trustee, Helen withdrew all the principal of the QTIP Trust and used it for appellant's benefit. Under the terms of the Trust, respondents would have shared in any principal remaining in the QTIP Trust at Helen's death.

The terms of the QTIP Trust are contained in article 5 of the Trust. Under article 5 the trustee is directed to pay all the net income of the QTIP Trust to the surviving spouse during her lifetime. If the trustee considers the income insufficient, article 5 gives the trustee an "ascertainable standard" for distribution of the principle, which is "as much of the principal as is necessary for the [surviving spouse's] health, education, or support to maintain the [surviving spouse's] accustomed manner of living."

Article 5 also includes a clause entitled, "Surviving Spouse's Power of Withdrawal," which provides: "The surviving spouse shall have the right during the surviving spouse's life to withdraw free of trust any part of the principal of this trust up to the whole amount thereof at such times and in such amounts as the surviving spouse, in the surviving spouse's sole discretion, may from time to time designate by written

[2] We shall refer to the settlors by their first names in order to simplify the discussion that follows. We mean no disrespect by doing so.

instructions filed with the trustee. During the life of the surviving spouse, there shall be no invasion of the principal of this trust for the benefit of any person except the surviving spouse."

Upon learning of Helen's withdrawal of the assets from the QTIP Trust, respondents prepared a proposed petition seeking a judicial determination that the withdrawal was inconsistent with the express terms of article 5 to the extent that Helen withdrew the assets for the benefit of someone other than herself. The proposed petition sought an order requiring the trustee to redeposit the assets withdrawn (plus reasonable appreciation) and an instruction that all principal distributions from the QTIP Trust meet the ascertainable standard set forth in article 5.

Prior to filing their petition, respondents filed what is commonly referred to as a safe harbor petition pursuant to former section 21320, by which they sought a judicial declaration that the proposed petition would not be a contest within the meaning of the Trust's no-contest clause. The trial court granted the safe harbor petition, holding that the proposed petition "would not violate the no contest clause." No appeal was taken from that ruling.

Before trial could be had on the first proposed petition, respondents came to believe that appellant had exercised undue influence over Helen, isolating her from respondents and causing her to wipe out the assets of the QTIP Trust and to direct the bulk of her estate to appellant and her family. Respondents drafted a proposed first amended petition to determine the validity of the distributions made from the QTIP Trust and for an accounting. The proposed first amended petition again alleged that the withdrawals from the QTIP Trust were inconsistent with the terms of article 5 and added facts to support the allegation that Helen made the withdrawals as a result of appellant's undue influence over her. Respondents amended the prayer for relief to include a request for an accounting of the QTIP Trust and a declaration that the transfer of assets from that

trust is null and void by reason of appellant's undue influence. Prior to filing the proposed first amended petition, respondents filed the safe harbor petition at issue here.

The trial court again granted the safe harbor petition, finding that the proposed first amended petition was not a contest because it did not "directly or indirectly" contest the terms of the Trust. "Rather, the [proposed first amended petition] only addresses whether the surviving spouse may withdraw all of the assets of the [QTIP Trust] other than for her own benefit." The court concluded that the proposed first amended petition does not allege that the Trust or any of its terms are invalid but "only addresses the limitations on the surviving spouse's and the trustee's powers to withdraw and distribute, respectively, and seeks determination of the validity of certain transfers that appear to exceed the authority of surviving spouse/trustee under the instrument. Further, the [proposed first amended petition] seeks an accounting, but does not invalidate or nullify the accounting requirements of the trust because the trust does not limit the trustee's obligation to account. Finally, the [proposed first amended petition] seeks the return of unauthorized distributions, but does not violate the no-contest clause because such result would be to enforce, rather than invalidate, the provisions creating the powers of distribution and withdrawal." The court concluded that its determination could be made without reaching the merits of the underlying petition. Accordingly, the court granted the safe harbor petition. This timely appeal followed.

II. DISCUSSION

A. Issue and Standard of Review

The only issue on appeal is whether the proposed first amended petition is a contest within the meaning of the Trust's no-contest clause. Since determination of the issue does not turn upon any disputed facts or questions of credibility, our review is de novo. (*Burch v. George* (1994) 7 Cal.4th 246, 254 (*Burch*); *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1200.)

B. Legal Framework

A no-contest clause "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch, supra*, 7 Cal.4th at p. 265.) "In essence, a no contest clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument. [Citation.] [¶] No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the [settlor]." (*Id.* at p. 254.)

" 'Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used.' [Citations.] . . . [E]ven though a no contest clause is strictly construed to avoid forfeiture, it is the testator's [or settlor's] intentions that control, and a court 'must not rewrite the [instrument] in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.' " (*Burch, supra*, 7 Cal.4th at pp. 254-255.)

Prior to its repeal, former section 21320[3] allowed a beneficiary to obtain an advance determination of whether a proposed action would amount to a contest within the meaning of the no-contest clause in question. If the court determined that the proposed action would be a contest, the beneficiary could then "make an informed decision whether to pursue the contest and forfeit his or her rights under a will [or trust]

[3] The Legislature has revised the provisions of the Probate Code relating to no-contest clauses, effective January 1, 2010. The new law eliminates the safe-harbor procedure and, among other things, provides that a no-contest clause may be enforced against a direct contest only when it is brought without probable cause, as defined. (§ 21311; Stats. 2008, ch. 174, §§ 1-2, p. 438.)

or to forgo that contest and accede to the [instrument's] provisions." (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.) Pursuant to subdivision (c) of former section 21320, the trial court is entitled to make a determination about whether the proposed action would be a contest only if the determination does not require the court to decide the merits of the action itself. The rule makes sense because the safe harbor procedure could otherwise be used to pursue the type of litigation the no-contest clause was intended to prevent. (*Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173; but see *Estate of Ferber* (1998) 66 Cal.App.4th 244, 251-252 [noting exception when beneficiary argues clause violates public policy].)

C. The Proposed First Amended Petition Is Not a Trust Contest

As appellant implicitly concedes, the Trust's no-contest clause prohibits only those actions that seek to invalidate or nullify the Trust or any of its provisions. This is clear from the express language of the clause, which penalizes a beneficiary who "contests . . . the validity" of the trust or "seeks to obtain an adjudication . . . that this trust or any of its provisions . . . is void, or seeks otherwise to void, nullify, or set aside this trust or any of its provisions."[4] Appellant maintains, however, that the proposed first amended petition seeks to "nullify" the power-of-withdrawal clause because the relief for which it prays "cannot be effectuated without invalidating the unencumbered powers granted" to the surviving spouse under that clause. Respondents contend that appellant has waived the argument. According to respondents, appellant may challenge only the

[4] The no-contest clause provides, in pertinent part, "If any beneficiary under this trust . . . contests in any court the validity of this trust or of a deceased settlor's last will or seeks to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such will or any of its provisions is void, or seeks otherwise to void, nullify, or set aside this trust or any of its provisions, or such will or any of its provisions, then that person's right to take any interest given to him or her by this trust shall be determined as it would have been determined if the person had predeceased the execution of this Declaration of Trust without surviving issue."

issues that were not decided in the first safe harbor proceeding. We reject respondents' contention.

The legal doctrine implicit in respondents' argument is the concept of collateral estoppel, an aspect of the doctrine of res judicata, which precludes relitigation of issues that were necessarily decided in prior litigation. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 984-985.) But the collateral estoppel defense is not jurisdictional so that it is waived if not raised. "Where a party joins issue on a question previously litigated or voluntarily opens an investigation of matters which he might claim to be concluded by a prior judgment, he will be held to have waived his right to assert the benefit of the former adjudication and the case will be determined without regard therefor." (*Dillard v. McKnight* (1949) 34 Cal.2d 209, 219.) Respondents did not raise the estoppel issue below but submitted the entire proposed first amended petition to the court without reservation. The trial court's order encompassed the whole of the proposed first amended petition. Our review is of that order. That said, we reject appellant's argument on the merits.

Appellant's argument reflects appellant's interpretation of the meaning of the Trust language. Since the parties disagree over the meaning, it was necessary and appropriate for respondents to seek a judicial interpretation. It is a fundamental rule of law that interpretation of any written instrument focuses upon ascertaining the intent of its authors. (Cf. *Estate of Boyd* (1957) 148 Cal.App.2d 821, 824-825; *Estate of Conway* (1958) 161 Cal.App.2d 704, 709.) Thus, in seeking a judicial interpretation of the meaning of the Trust language, respondents are merely trying to enforce the intent of the settlors.

Appellant argues that, because the proposed first amended petition seeks an order requiring that all principal distributions from the QTIP Trust meet the "ascertainable standard," it is, in effect, an attempt to eliminate the surviving spouse's discretion granted by the power-of-withdrawal paragraph. The argument merely points out what might,

arguably, be an ambiguity in the language of the instrument. That does not change the fact that the proposed first amended petition seeks to interpret, not to invalidate, the Trust provisions. Whether the ascertainable-standard paragraph conflicts with the power-of-withdrawal paragraph is a problem of interpretation that is for the court to decide at trial of the proposed first amended petition. As the trial court correctly concluded in the safe-harbor proceedings, since the proposed first amended petition sought only to ascertain the meaning of the language, it is not an attempt to thwart the intent of the settlors or to nullify or invalidate the Trust. Therefore, it is not a contest.

Not one of the cases appellant cites convinces us otherwise. In *Cory v. Toscano* (2009) 174 Cal.App.4th 1039, the proposed petition urged the trial court to disregard handwritten notations on the trust instrument and to hold that they were no part of the trust at all. (*Id.* at p. 1043.) In *Estate of Kazian* (1976) 59 Cal.App.3d 797, the challenger sought to have the estate's assets declared community property, which would have entitled him to one-half of the estate rather than the small sum the decedent had expressly left to him in her will. (*Id*. at pp. 802-803.) In *Estate of Goyette* (1968) 258 Cal.App.2d 768 concerned an objection to a testamentary gift to charity on the ground that the amount granted was prohibited by statute. (*Id.* at pp. 772-773.) And in *Estate of Friedman* (1979) 100 Cal.App.3d 810, the appellant's lawsuit directly attacked the terms of her mother's will and trust on the ground that her mother had executed the instruments as a result of the undue influence of her surviving husband. (*Id.* at pp. 816-817.)

In each of the preceding cases, the appellate court rejected an argument that the proposed litigation sought only interpretation or construction of the terms of the instrument. Appellant advances these holdings as support for her position that respondents cannot disguise their attempt to nullify the power of withdrawal by calling it a request for interpretation. But analysis of the factual bases for the courts' rulings in the foregoing cases shows that the litigation, if successful, would have changed the intent of the testator or the settlor as expressed in the instrument. The litigation would have

eliminated the terms the settlor included in handwritten notations (*Cory v. Toscano*, *supra*, 174 Cal.App.4th at p. 1043), altered the decedent's express wishes that a particular percentage of his estate be given to charity (*Estate of Goyette*, *supra*, 258 Cal.App.2d at pp. 772-773), or otherwise nullified the express terms contained in the estate plan (*Estate of Kazian*, *supra*, 59 Cal.App.3d at pp. 802-803; *Estate of Friedman*, *supra*, 100 Cal.App.3d at pp. 816-817). In the present case, respondents are not seeking to eliminate any of the terms of the Trust or to redistribute the trust estate contrary to the intent expressed in the instrument. Although respondents seek to invalidate the *distributions* out of the QTIP Trust, they do not seek to revise the terms of the Trust itself.

Appellant argues that, since respondents do not claim that the trust language is ambiguous, their request for an interpretation of the Trust is "disingenuous." This argument borders on the frivolous. Appellant herself claims that the Trust language is clear and needs no interpretation, insisting that the power of withdrawal was intended to be "uninhibited," "unqualified," "unencumbered," "unequivocal," and "unconditional." But the Trust does not use any of those words to describe the power of withdrawal. Instead, the Trust gives the surviving spouse "sole discretion" to invade the principal but then adds the proviso that "there shall be no invasion of the principal of this trust for the benefit of any person except the surviving spouse." The very fact that the parties disagree over the effect of that proviso demonstrates the need for a judicial interpretation.

We also reject appellant's argument that the proposed first amended petition is a contest because it violates the Trust's exculpatory clause. That clause provides that no trustee shall be liable for any act or default unless the act resulted from "the trustee's intentional misconduct, gross negligence, bad faith or reckless indifference to a beneficiary's interest, or unless the trustee derives a profit from a breach of trust." Appellant cites *Hearst v. Ganzi*, *supra*, 145 Cal.App.4th 1195, in support of her claim that, in seeking return of the assets removed from the QTIP Trust, respondents' proposed first amended petition violates the exculpatory clause. The case is inapplicable.

In *Hearst v. Ganzi*, the proposed petition alleged that the trustees had breached their fiduciary duty by making decisions that favored the remainder beneficiaries over the income beneficiaries. The litigation sought an award of damages against the trustees. (*Hearst v. Ganzi*, *supra*, 145 Cal.App.4th at p. 1204.) The appellate court held that the litigation was a contest because the challengers were attacking conduct by the trustees that was expressly authorized by the trust; the trust directed the trustees to make long-term investment decisions that could benefit remainder beneficiaries at the expense of the income beneficiaries. (*Id.* at pp. 1210-1212.) Furthermore, the proposed petition "would request the probate court to 'award damages according to proof at trial against the Trustees and in favor of all income beneficiaries,' that is, to surcharge the Trustees personally." (*Id.* at p. 1213.) This, the court held, conflicted with the exculpatory clause in the trust. (*Ibid.*) Here, in contrast, respondents challenge an act they claim is expressly forbidden by the Trust. Their challenge does not conflict with the terms of the Trust as the litigation in *Hearst* did and it does not seek to surcharge the trustee (Helen) personally or to recover damages in favor of respondents. Rather, it seeks to invalidate the distributions and recover the assets for the Trust. Thus, the pleading does not implicate the exculpatory clause at all.

We summarily reject two of appellant's subsidiary arguments. First, respondents' demand for an accounting does not constitute a contest of the Trust because nothing in the Trust or in the cited statutes (§§ 16062-16064) prohibits such a demand. Second, we reject appellant's contention that former section 21305 does not exempt the pleading from being considered a contest. Former section 21305, which listed the types of challenges that were not considered to be contests, applied only to instruments executed on or after January 1, 2001 (former § 21305, subd. (a)) and, in any event, the trial court did not rely upon it here.

Appellant's final argument is that the trial court's ruling improperly required a factual determination of the merits of the proposed first amended petition. We disagree.

The concern underlying the trial court's determination was the effect upon the Trust if the litigation is successful. If a successful challenge would nullify, invalidate, or otherwise alter the intent of the trustors, then the litigation would be subject to the no-contest clause. In order to make its determination, the trial court had to look only to the facts and legal argument contained on the face of the pleading. That is, the trial court presumed the truth of the facts pleaded but did not make any factual findings.

Although we have rejected all of appellant's arguments pertaining to whether or not the proposed first amended petition is a contest within the meaning of the Trust's no-contest clause, we express no opinion upon the merits of that petition. The truth of the facts pleaded and interpretation of the language of the Trust are issues that remain to be tried.[5]

[5] Respondents have advanced the argument that the proposed first amended petition does not violate the no-contest clause to the extent that clause applies to the Bypass Trust. Appellant did not raise the issue in her opening brief. In any event, since we have concluded that the proposed first amended petition is not a contest, we need not reach the issue.

III. DISPOSITION

The order of the superior court granting respondents' request for a declaration that the proposed first amended petition is not a contest of the Silva Family 1991 Living Trust is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.